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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD,
AND
Petitioner,
LOCAL 150-T SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO)
Intervenor,
v.
BAPTIST HOSPITAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE UNION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 576 F.2d 107, and is reproduced at Pet. App. 1a-12a.* The decision and order of the National Labor Relations Board are reported at 223 NLRB 344 (Pet. App. 15a-93a).

JURISDICTION

The judgment and order of the Court of Appeals was entered on May 10, 1978. (Pet. App. 13a.) The Petition for a Writ of Certiorari was filed by the National Labor Relations Board on August 8, 1978 and granted on January 8, 1978. The jurisdiction of this Court is invoked under 28

*"Pet. App." refers to the Appendix to the Petition for Certiorari in this case. "A." refers to the record Appendix in this Court. "Tr." refers to the transcript of record before the Board.

U.S.C. § 1254(1). The motion to intervene was filed on Jan. 12, 1979 and was granted on March 5, 1979.

QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that a hospital employer violated the National Labor Relations Act by banning union solicitation in all areas of the hospital to which the public had access and distribution of union literature in all those areas as well as in all work areas?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 88 Stat. 395 (29 U.S.C. § 141 *et seq.*) are:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.
>
> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

STATEMENT OF THE CASE

A. *The Proceedings Below*

This case arose when Local 150-T, Service Employees International Union, AFL-CIO (hereafter "the Union") began an organizing campaign at Baptist Hospital in Nashville, Tennessee in August 1974, just after the National Labor Relations Act ("NLRA") was amended to cover nonprofit hospitals such as Baptist. (Act of July 26, 1974, P.L. No. 93-360, 88 Stat. 395.) When the hospital responded by promulgating a revised no solicitation/no distribution rule forbidding solicitation "in any area of the Hospital which is accessible to or utilized by the public" and, in addition "distribution of literature in any work area at any time," the Union filed charges with the NLRB contending, *inter alia*, that the revised rule violated § 8(a)(1) of the

NLRA, 29 U.S.C. § 158(a)(1). After two days of hearings upon the complaint filed by the General Counsel, the Administrative Law Judge concluded that the Hospital's new rule was invalid. Noting that "the record is lacking in any evidence that the work of employees was impeded . . . by the advent of the Union" (Pet. App. 75a), and that "there exist, without the necessity to prohibit all union solicitation . . . on nonwork time, rules which prohibit *unruly* conduct by any employee" (*id.*, emphasis supplied), the ALJ concluded that "the current no-solicitation, no-distribution rule is overly broad [and] interferes with employees Section 7 rights." (*Id.*, at 76a.)

The Board affirmed these findings and the conclusion that the employer had violated § 8(a)(1). (*Id.*, at 16a.) The Board also found that the company had violated §§ 8(a)(1) and 8(a)(3) by discriminating against Clyde French, the employee most actively involved in the organizing campaign. (*Id.*, at 16a-21a.) The Court of Appeals for the Sixth Circuit, however, taking a view diametrically opposed to that of the Board and the ALJ, believed that "the hospital did carry its burden of establishing special circumstances." (Pet. App. 19a.) That court thereupon denied enforcement to the Board's order, except that with respect to the finding that French had been discriminated against, and remanded the case to the Board to specify to what extent, if any, that discrimination was "unrelated to the hospital's no-solicitation rule." (*Id.*, at 12a.)

Particular stress was placed by the Court of Appeals upon testimony by two physician witnesses that "volatile or hostile discussion of any subject . . . would be detrimental to [the patients'] well-being" (Pet. App. 8a), and that "anything which interferes with patient care should be forbidden." (*Id.*) The Court of Appeals did not, however, point to any evidence that union solicitation would lead or had led to "volatile or hostile discussion," nor did it explain why the ALJ was wrong in concluding that existing general rules against disruptive activity were sufficient to prohibit such conduct as would in fact interfere with patients' well-being.

Shortly after the decision below, this Court decided *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, upholding a Board determination that a no solicitation/no distribution rule in a hospital was invalid as applied to a cafeteria used predominantly by employees.

B. *The Facts*

Reading the account of the relevant facts as explicated by the ALJ, by the Court of Appeals, and by Respondents (in their Brief in Opposition) gives the distinct impression that one is reading about three entirely different cases. For that reason, we present a fairly detailed account of the factual record, focussing particularly upon areas of inquiry whose importance is highlighted by *Beth Israel, supra.*

1. *The Rule, Its Promulgation and Its Application*

Before the advent of the union, and of the hospital amendments to the National Labor Relations Act, the Employer had a no-solicitation rule which read as follows:

> Solicitors—In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval of the Administrator. Violation of this policy will subject employee to disciplinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their Supervisor. [Pet. App. 32a-33a]

This rule "was basically designed to keep salesmen out of the Hospital" (Pet. App. 33a), and in terms applied only to solicitation of patients and visitors, not to solicitation of employees.

In October 1974, a new rule was posted, reading in its entirety as follows:

> The solicitation and distribution policy of Baptist Hospital has been revised. This has been done to help protect the privacy and rights of employees as well as to help maintain a good working environment and appearance throughout the hospital. The policy is as follows:

> No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.
>
> No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time. [Pet. App. 34; A. 75]

This rule revision was a "direct result of [the] union organizational campaign." (A. 6; see also, A. 36-37; Tr. 142.)

Just before the official rule revision, at least one employee, Clyde French, handed out union literature and solicited employees on behalf of the union in both the parking lot and the cafeteria for about two months, but was not disciplined for that activity. (A. 21.) As the Hospital's personnel director conceded, "distribution in these areas [the parking lot and cafeteria, where most of the soliciting occurred] had not become a problem" (*id.*) during this period. While there was testimony that "when the union came in . . . discussions of union action, pros and cons, some for, some against, was causing disruption in our work force" (A. 5), the so-called "disruption" seems to refer only to complaints that the union organizer was "bothering" employees simply by attempting to discuss the union with them in the cafeteria (Tr. 425, 427.) Yet, while certain of the employees solicited did voice opposition to the union (A. 68) the exchanges never led to sharp words, rudeness, shouting, or any kind of disturbance. (A. 66-67; 72.) Nor was there *any* evidence that during the period distribution and solicitation were tolerated, any *patient or visitor* had complained

about, been affected by, or even been aware of union activity in areas accessible to them.

The evidence as to the precise areas covered by the October, 1974 rule in its various aspects is decidedly unclear in several respects. Generally, it was testified by the employer, that solicitation is permitted in "nursing stations, utility rooms, maintenance building, laundry building [and] dining areas." (A. 8.)

The "dining areas"—also referred to as "lounges" (see, *e.g.*, Pet. App. 36a)—consist of two rooms equipped with vending machines. One is located in the laundry building, some distance from the main building (*id.*), and holds up to fifty employees. Employees other than laundry employees were not known to use that dining area during break periods. (A. 16-17.) Similarly, the other dining area or lounge was small (25 to 30 person capacity) and was intended for use primarily by employees working on surgery. (A. 17.) There are 1800-1900 employees in all. (Tr. 85.)

There are, at Baptist, about 28 utility rooms (A. 17.) and about 26 nurses stations (A. 18.) The utility rooms are used both for work and, very occasionally, for breaks by employees. (A. 17-18.) Pursuant to the revised rule, no distribution of literature would be permitted in the utility room since they are work areas.[1] The nurses' stations, while they are internally off limits to the public, are "the hub for all the activity for patient care on [each] floor" and are work areas (*Id.*) Thus, while nurses' stations were represented to be areas where solicitation (but *not* distribution of literature) would be permitted, the availability of

[1] There was testimony by Mr. Victory, Baptist's Vice-President for Personnel Services (A. 3), that distribution of literature would be permitted in the utility rooms unless "it becomes a housekeeping problem." (A. 19). Nevertheless, this same witness testified that the no solicitation/no distribution rule would be enforced "as it is written" (A. 34), which would plainly preclude distribution in work areas such as utility rooms.

these areas for union activity under the October 1974 rule is surely quite limited: That rule forbids solicitation by or of employees "who are supposed to be working"; it would seem, from the description of their function, that nurses' stations are ordinarily populated by employees "who are supposed to be working."[2] Further, it seems that categories of employees not directly involved in patient care would not have access to "*nurses*'" stations either as solicitors or solicitees.

The hospital personnel director did not mention either employee rest rooms or locker rooms as areas in which solicitation is permitted.[3] Thus, if such areas are available, their number and accessibility by potential organizers was not established.

In the end, then, the testimony definitely established only that *distribution* of union literature was permitted in the two small, remote "dining areas" or "lounges."[4] While

[2] The Hospital interprets "supposed to be working" to mean "on duty," even if there is no work to be done at the time. This was evidenced by an incident regarding solicitation of two employees who were on duty but, at the time, were relaxing and conversing because they had no work to perform. The union organizer, Mr. French, was disciplined for conversing with the two "on duty" employees even though they had no work to perform at the time and were permitted by their supervisor to converse between themselves (Pet. App. 44a-45a, 80a; Tr. 376, 379, 381).

[3] While there were references to a "snack bar" in which employees frequently took breaks (A. 47, 71) it appears that the "snack bar" was simply that area of the cafeteria which had vending machines. (A. 49).

[4] Thus, the court below misconstrued the record when it assumed that "numerous locations" at the hospital were available for union activity. (Pet. App. 10a). In particular, that court plainly erred in stating that "[s]olicitation *and distribution* are permitted in *several* employee lounges . . . , 28 utility rooms, 26 nurses' stations and those rest rooms which are restricted to employees." (Pet. App. 3a.) Distribution was clearly forbidden in most of the mentioned areas, and there were *two* lounges, both in specialized locations, not "several."

it was indicated that *solicitation* would be allowed in certain other areas, those areas do not appear to be frequented generally by off-duty employees, the only employees who could be solicited.[5]

As to areas where solicitation (and distribution) is *not* permitted, the evidence is silent entirely as to the character and use of certain of those areas—corridors and elevators, for example.

With respect to the cafeteria, it was established that this facility holds approximately 150 persons at a time. (A. 16)[6] The cafeteria is an area "where the employees and general public eat and relax" (Pet. App. 36a; A. 12). Normally, when employees are in the cafeteria, they are on break or lunch period (Pet. App. 35a-36a; A. 12), and most employees normally take at least one of their breaks each day in either the cafeteria or the adjacent snack bar. (A. 49, 71). Patients and their families sometimes use the cafeteria. (Pet. App. 35a; A. 12). However, patients do not receive any treatment in the cafeteria (*id.*), and must receive permission to leave their floor to use the cafeteria. (Pet. App. 35a; A. 64). Consequently, only a "small percentage" of the people using the cafeteria are likely to be patients. (*Id.*; see also A. 50).[7] And, employees are ordinarily identifiable

[5] Most of the rest rooms were apparently available to the public as well as to employees, and thus were off limits for union solicitation or distribution (Pet. App. 35a; A. 14).

[6] Under "Miscellaneous Benefits and Services" the Hospital's Employee Handbook states: "The hospital cafeteria is available to all employees and is open for breakfast, lunch and dinner. Employees must wear name pin to receive special employee rate." (A. 105).

[7] The Hospital's personnel director testified to a "study" *by hospital personnel* showing that a significant percentage of the people using the cafeteria were "nonemployees." (A. 26-27). However, that "study" covered only meal hours, although the cafeteria area is open for vending machine use twenty-four hours a day; the "study" also did not include, during meal hours,

in the cafeteria, because they must wear identification pins on their uniforms and will receive a good discount only if wearing the pins (A. 36). There was no evidence that Mr. French, who solicited extensively in the cafeteria (A. 51), ever erroneously approached a patient or a visitor. In fact, Mr. French noted that patients are usually identifiable because "they will be in their pajamas and bathrobe." (A. 50).

With respect to the lobby and the gift shop—the other areas in which solicitation was forbidden because they are open to the public and as to which any substantial evidence at all was elicited—it was shown that patients might enter either area (if they obtain permission to leave their floor) but that normally, patients are not found in those areas. (A. 11, 13).

2. *The Asserted Justification for the No-Solicitation/No-Distribution Rule*

The October 1974 rule contains, in the first paragraph, its own explanation of why the rule was promulgated—primarily "to help protect the privacy and rights of employees." (Pet. App. 34a; A. 75.)[8] *No* mention was made in this document of any concern for the medical effects of union solicitation upon patients. ***Nor was the hospital's medical***

people who used the vending machines or brought lunch; the survey did not distinguish, among "nonemployees," the percentage of patients, of patients' visitors, of hospital volunteers, of student nurses, physicians, and technicians, and of doctors and private nurses rendering care to patients but not employed by the Hospital; and finally, the number of days, the hours, the time of year, and other facts pertinent to assessment of the survey were not given, nor did the person who actually conducted the survey testify. (A. 36-37). Presumably for these reasons, neither the Court of Appeals nor Respondent (see Br. in Op., 5) has relied upon this so-called "study," and we consider its lack of relevance and reliability to be conceded.

[8] The testimony bears out that complaints by employees that they would rather not be approached concerning the union were one reason the new rule was announced. (See pp. 5-6, *supra*.)

staff consulted when the October 1974 rule was devised, although legal counsel was. (Pet. App. 66a, 72a; A. 21-22, 72-73). Nonetheless, the Employer endeavored to justify the rule as primarily motivated by the need to protect patients from disturbing influences anywhere in the hospital.

Toward this end, two private physicians testified. Dr. Birmingham had never known of anyone upset by union solicitation, nor did he have any knowledge of whether union solicitation might be disruptive. (A. 44-46). While he testified that a "volatile or hostile" or a "heated discussion" could medically affect a patient (A. 40, 42), he did not think that "a normal conversation between one employee who asked [another] employee to sign a union card . . . would have any effect." (A. 45). Also, while Dr. Birmingham testified that the hospital staff tries to "shield the patient as much as we possibly can from . . . bad news" (A. 40), he specifically noted that television sets are played in patients' rooms, and that some patients are upset by this. (A. 41). The remedy is not to ban televisions, but to move the disturbed patient to another room. (*Id.*)

Dr. Ricketson's testimony was similar. He stated that "there shouldn't be any unnecessary turmoil, confusion, loud noises and things going on" in areas open to patients or patients' families, because the patient's medical condition could be affected. (A. 53). At the same time. Dr. Ricketson was not aware of any adverse effects from union solicitation (A. 61) and, in fact, did not know what union solicitation consists of. (*Id.*)[9] He did not think that the average patient would be disturbed by employees sitting in the cafeteria quietly discussing the union, and was primarily concerned with preventing "a general meeting" or "a speech." (A. 62; see also A. 63-64).

[9] The following colloquy occurred on cross examination, after Dr. Ricketson had given his "expert" opinion on direct examination: Q. "Union solicitation; do you know what [effect] it would have?" A. "First, may I ask the question to be sure you and I understand; what is union solicitation, what does it consist of?" (A. 61).

Dr. Ricketson also suggested at points that patients could become detrimentally upset simply overhearing "activities that do not have to do with the taking care of patients . . ." (A. 52-58). However, there was no evidence that all other conversations "that do not have to do with the taking care of patients" were banned in areas such as the cafeteria. Indeed, employees are specifically cautioned that discussion which *does* concern care of individual patients "often reveals confidential information" so that employees should be "careful about [such] conversation in elevators, eating places and other places of public assembly." (A. 98-99).[10] It is also noteworthy that this caution is *not* stated as a *ban* on such discussions with other employees in public places but, rather, as an admonition to "be . . . careful" to conduct such discussions discretely.

Finally, while Dr. Ricketson did indicate that even seriously ill patients may have considerable mobility—for example, before an operation (A. 54)—it appears that the medical staff in practice is not particularly concerned with shielding such persons from the ordinary activities of the outside world. For, pre-operative patients may be given "a two hour leave if they want to go out and eat dinner at a public restaurant." (A. 54-55).

The Administrative Law Judge's summary of the pertinence of this "expert" testimony, in light of the rest of the record, is quite apt:

> [T]he testimony of the physicians in the instant

[10] Some of these rules read as follows:

> *Noise*—Noise deters patient treatment and recovery. It is each employee's obligation to avoid unnecessary noise in the hospital. Speak in a quiet, pleasant tone; use care in handling equipment, avoid clashing dishes, glassware and metallic objects. Employees should be alert for sources of unnecessary noise and to report these promptly to their Supervisor. [A. 100].
>
> *Employee Conduct*—As a hospital employee at Baptist you

case was directed to *possible* effects of union campaigns and was given pursuant to certain hypothetical questions. These questions involved what might be considered the *possible* consequences of *possible* violent reactions of employees to union literature. However, there is no evidence in the record of sufficient substance to show that the conduct of the Union or any of the Respondents employees was of such nature as to make the rule an overriding necessity. Moreover, there are other sections of the Respondent's "Employee Handbook," which would, or could, be utilized by the Respondent to discipline an employee engaged in union solicitation who does not otherwise conform to the rules of employee conduct. Thus, there exist, without the necessity to prohibit all union solicitation anywhere on the Respondent's premises on nonwork time, rules which prohibit unruly conduct by any employee, including one engaging in otherwise lawful union solicitation. Additionally, even newspaper articles or television or radio broadcasts available to patients could possibly be more upsetting to a patient's psychological well being than the observation by a patient of quiet and mannerly union solicitation of one employee by another. Yet, it is highly improbable that the Respondent would care to eliminate these means of communication from the world outside the Hospital. [Pet. App. 75a, emphasis in original; footnote omitted.]

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have high standards to maintain. You are urged, therefore, to refrain from loud talking and laughing, gossiping, needless complaining, and any other activity that would be disturbing to the patient or out of place in a hospital. [A. 99-100].

Strangers and Difficult Persons—The proper handling of difficult persons is important in order not to disturb patients. In all cases make the situation known to your Supervisor and seek immediate aid if possible from qualified hospital personnel. DO NOT use force except in self-defense against other employees, patients or visitors. To do so may make you liable for any damages or injuries. [A. 102].

INTRODUCTION AND SUMMARY OF ARGUMENT

Beth Israel Hospital v. *NLRB*, 437 U.S. 483, concerned a Board order which had invalidated a hospital's no-solicitation/no-distribution rule as applied to a hospital cafeteria. Dividing 5-4 as to rationale but unanimous in result, this Court sustained that order. *Beth Israel* is critical—indeed, conclusive—for this case for three reasons.

I. On the precise question there decided—the application of a no solicitation/no distribution rule to a hospital cafeteria and coffee shop predominantly used by employees—that case is indistinguishable. Among other similarities to *Beth Israel* are: The cafeteria in this case, while used by patients and visitors, is the principal gathering place for employees; during a period when union solicitation was permitted, no patients or visitors were affected; and, a less restrictive approach would apparently prevent the disturbances feared. Thus, not only does *Beth Israel* directly require invalidation of Baptist's rule as applied to the cafeteria and snack bar but the striking similarities between the two cafeterias illustrates why the NLRB's approach of operating upon presumptions regarding the relative weight of the interests of employees and employers in certain functional areas of hospitals is plainly correct.

II. *Beth Israel* establishes two basic principles applicable beyond the cafeteria context—*viz.*, that Congress did not, in enacting the 1974 NLRA amendments covering non-profit hospitals, change the normal rule that an employer who promulgates a broad no-solicitation/no-distribution rule has the burden of justifying that rule, and that the Board's evaluation of such a justification is entitled to deference in health care industry cases to the same extent as in cases arising in other industries. Indeed, as the history of the 1974 Amendments demonstrates, Congress specificially recognized that in deference to the principles of employee self-organization and collective bargaining the national labor policy tolerates some risk of interference with patient care. And, that history also illustrates that the NLRB in deciding hospital no-solicitation/no distribution

rule cases, as in all others, is to fulfill the principal function of explicating national labor policy by balancing the employee interest in self-organization against the employer's management interest. Nor can that function be usurped by the respondent hospital through the simple expedient of presenting "medical" testimony. The Labor Board is fully equipped to judge the pertinence of such testimony on the basis of other facts developed. Often, as here, the asserted medical reasons turn out, upon analysis, to be nothing more than a determination that a risk is not justified where the countervailing interest is employee self-organization, while a risk of the same magnitude is countenanced by the hospital medical staff where the countervailing interest is the hospital's own.

III. Finally the *Beth Israel* majority expressly approved the Board's general rule, established in *St. John's Hospital & School of Nursing*, 222 N.L.R.B. 1150, that, outside immediate patient care areas, hospitals may not prohibit union solicitation and distribution "in areas, other than immediate patient-care areas, such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas." (437 U.S., at 495) While there appears to be some question concerning whether that approval extends beyond cafeteria cases (see *NLRB* v. *Baylor Univrsity Medical Center*, ... U.S. ....., 44 L.W. 3298 (Oct. 30, 1978) (*per curiam*), the reasoning of *Beth Israel* supports the conclusion that the Board's basic position is entirely sound. At any rate, applying either the *St. John's Hospital* standard or the standard indicated by the concurring Justices in *Beth Israel* (whether there has been shown to be "a reasonable possibility of harmful consequences to patients or visitors" (437 U.S. at 516)), the Employer in this case must be held to have failed to meet its burden. Alternatively, if the Court is not satisfied that the Employer has failed to do so and believes that a case-by-case inquiry into the degree of interference with effective union organizing activity and with patient care in *specific areas* is needed, the Board's order should not be reversed; rather,

in that event the case should be remanded for further factual development, with particular emphasis upon questions relating to hospital restrictions upon activities analogous to union solicitation and distribution in their potential physical and emotional impact upon patients and visitors.

ARGUMENT

I

The Cafeteria

In *Beth Israel, supra,* the Court held that "the Board's conclusion [in *St. John's Hospital, supra*] that 'the possibility of any disruption in patient care resulting from solicitation or distribution is remote' . . . as applied to petitioner's cafeteria, is fully supported by the record." (437 U.S. at 502.) A review of the "record" deemed to support the Board's conclusion demonstrates that the function of the cafeteria at Baptist is materially identical to that at Beth Israel, and that no greater probability of disruption has been shown here.

Baptist Hospital, like Beth Israel, provides "patients' meals . . . in their rooms" and "[a] patient is not allowed to visit the cafeteria unless his doctor certifies that he is well enough to do so." (*Id.*, compare p. 8, *supra*).[11] Thus, in Baptist Hospital, as in Beth Israel,

> patient use of the cafeteria is voluntary, random, and infrequent . . . Patients who frequent the cafeteria would not expect to receive special attention or primary care there and any unusually sensitive to seeing union literature distributed or overhearing discussions

[11] In *Beth Israel*, it was possible to quantify precisely the infrequency of use by patients and visitors, because a careful study had been done by the Hospital for an independent purpose. Here, while no such study was available (see pp. 8-9, n. 7, *supra*), witnesses presented both by the General Counsel and the Employer agreed that the number of patients using the cafeteria was small, and that more employees than nonemployees eat there.

There was no testimony in this case that any patients are specifically encouraged or instructed to use the cafeteria for medi-

about unionism, readily could avoid the cafeteria without interfering with the hospital's program of care. [437 U.S. at 502]

Further, just as it was "especially telling" in *Beth Israel* that limited union solicitation for a period had occurred "apparently without untoward effects" (*id.*), so here, the fact that after two months of unrestrained solicitation and distribution Baptist could not point to *any* evidence that even a single patient or visitor was aware of, much less harmed by, that activity in the cafeteria is no less "telling"[12] Nor can the physicians' testimony in this case fill the gap: the doctors' opinions were premised on the assumption that the union solicitation would be conducted in such a

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cal reasons. Compare *Beth Israel*, 437 U.S. at 517 (Powell, J., concurring):

> No testimony was introduced that the practice at Beth Israel is to seek early rehabilitation of patients by encouraging them to leave their rooms at the earliest time compatible with their condition, and to move about the hospital. The further weakness in petitioner's case is that it introduced no medical testimony that related such practices and needs to its cafeteria.

[12] That *employees* may have been annoyed is of no moment. In any industry, some employees may dislike interference with their daily routine by employee-organizers, or may be irrevocably opposed to unions as such and complain of solicitors for that reason. To permit employee resistance to solicitation to act as a veto upon union organizing would be to negate the long-accepted view that "the right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate regarding self-organization at the job site." (437 U.S. at 491).

Moreover, as long as the solicitors are, as here, courteous and willing to move on if the employees approached so request (A. 66, 72), overtly disruptive reactions by employees approached ought not to be a ground for refusing socilitation rights; if it were, the anti-union employees could effectively thwart union organization simply by purposely volatile reactions. Rather, any rules or discipline in such circumstances should be directed at those employees whose excessive action creates the problem. Compare *Schneider* v. *Irvington*, 308 U.S. 147, 162:

manner that patients or visitors would be disturbed, while the record of actual solicitation here, as in *Beth Israel*, provides no basis for that assumption as regards the cafeteria.[13]

Moreover, as in *Beth Israel*, Baptist "adopted a less restrictive approach to behavior in the cafeteria which would be at least as disquieting to patients as union solicitation . . ." (437 U.S. at 502-503, n. 20). For, like Beth Israel, Baptist noted that patients and visitors could be upset by overhearing conversations between employees concerning patients' conditions but, rather than banning such conversations in the cafeteria, merely cautioned employees to "be careful" not to be overheard.

It appears, in addition, that "petitioner's rule was more restrictive than necessary" to prevent upsetting patients and interferring with their care. (*Id.* at 502). The pre-1974 version of the no solicitation/no distribution rule at Baptist forbad these activities with respect to patients and visitors. As in *Beth Israel*, such

> a rule . . . would do much to prevent potentially upsetting literature from being read by patients. . . . This rule could be readily enforced at petitioner's hospital . . . since employees are required to wear name tags . . . [437 U.S. at 503-504, n. 23]

In addition, as the ALJ in this case stressed (p. 12, *supra*), existing general hospital rules of conduct could be

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> This constitutional protection [the First Amendment] does not deprive a city of all power to prevent street littering. There are obvious mehods of preventing littering. Among these is the punishment of those who actually throw papers on the streets.

[13] As at Beth Israel, "it has not been shown that organizational activity . . . actually resulted in distribution to nonemployees." (*Id.* at 503-504, n. 23). See also *id.*, at 516 (Powell, J., concurring):

> While the hospital was concerned about the disruptive effect on patients of employees' conversations about the medical progress of particular patients, it implemented only a precatory rule, not an outright prohibition of such conversations in the cafeteria.

invoked to prevent unruly, disruptive, or noisy union organizing activity. Furthermore, a ban upon large group meetings or speeches—which is probably already implicit in the general conduct rules—would eliminate the sort of inappropriate activity Dr. Ricketson identified (p. 11, *supra*) as potentially harmful to patients.

The *Beth Israel* court also indicated, although it did not decide, that "the availability of one part of a health-care facility for organizational activity *might* be regarded as a factor . . . to be considered." (*Id.* at 505, emphasis supplied.) In this case as in *Beth Israel* that problem need not be resolved, for

> [t]hat consideration is inapposite here, . . . where the only areas in which organizational rights are permited is not conducive to their exercise [and where the cafeteria] is a 'natural gathering area' for employees . . . and one in which the risk of harm to patients is relatively low as compared to potential alternative locations. . . ." [*Id.*]

For, it appears that the only areas in which the Baptist rule permits solicitation and distribution are two small dining areas used primarily by specialized groups of employees; and the areas in which solicitation but not distribution is theoretically permitted are areas in which work may be in progress at any time, so that solicitation could be forbidden for that reason.

Thus, the Baptist cafeteria is not one of the "many hospital coffeeshops and cafeterias that are primarily patient and patient-relative oriented." (437 U.S. at 509) (Blackmun, J., concurring). Rather, "the undisputed evidence portrays this cafeteria as being one essentially operated for employees as their primary gathering place." (*Id.* at 517) (Powell, J., concurring).

In the end, the rather remarkable similarity between the main cafeteria and snack bar in this case and those in *Beth Israel* illustrates the wisdom of permitting the NLRB to proceed with its task of assessing no solicitation/no distribution rules in hospitals by developing general presumptions based on its experience and applicable to certain kinds of situations, and placing the burden upon the employer to rebut such presumptions by showing with specific evidence that "the prohibitions [are] *necessary* to avoid disruption of health care operations on disturbance of patients." (*Beth Israel*, 437 U.S. at 507, emphasis supplied). For, through hearing many hospital organization cases in the several years since passage of the 1974 Amendments,[14] the Board has acquired a familiarity with the internal operations of hospitals similar to that it had developed with respect to industrial plants prior to developing the parallel presumption approved in *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793. As the comparison above illustrates, there do appear to be, from hospital to hospital, certain constant factors in the general function and operation of specific areas. To nonetheless require the Board itself to provide evidentiary proof, in each case, of the basic facts supporting the presumption, or to allow hospitals to place that burden upon the Board simply by introducing generalized "medical" testimony such as that introduced here, would be to burden the NLRB and the courts of appeals for no useful purpose.

II

Congressional Intent and The NLRB's Role

In this case, the NLRB applied the *St. John's Hospital* presumption to all areas other than immediate patient care areas. In assessing this application the Court of Appeals relied upon two factors explicitly rejected in *Beth Israel*: First, that court perceived in the legislative history of the 1974 Amendments sanction for requiring the Board to accord less weight to employees' organizational rights in the hospital context than in others. (Pet. App. 9a.) And second,

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[14] Prior to 1974, the Board had in a few cases considered the validity of no solicitation/no distribution rules in proprietary hospitals, but "no clear rule merged from its decisions." (*Beth Israel*, 437 U.S. at 494.)

the Court of Appeals by its heavy reliance upon the two doctors' testimony, appeared to require the Board to defer to the judgment of the hospitals' medical advisors, rather than performing itself the task of balancing the relative interests of the employer and employees.

A. As the *Beth Israel* opinion noted (437 U.S. at 496-500), the history of the 1974 Amendments does not support the view that Congress intended to require that any conceivable interference with patient care overrides the employees' rights to organize and to bargain collectively; indeed, the fair implication of that history is quite the opposite—that Congress did not intend employees' interests to be sacrificed where interference with the hospital's admittedly vital function is only a hypothetical possibility. For, over and over again the legislative history of the 1974 Amendments demonstrates the underlying premise of that legislation to be that hospitals are not special in any way which justifies depriving their employees of the basic rights enjoyed by other employees under the NLRA.[15] Indeed, the elimination of the nonprofit-hospital-exemption reflected Congress' judgment that hospital care would be improved by extending the protection of the Act to nonprofit health-care employees. Congress found that wages were low and working conditions poor in the health-care industry, and that as a result employee morale was low and employment turnover high. Congress determined that the extension of organizational and collective-bargaining rights would ameliorate these conditions and thereby elevate the standard of patient care. (437 U.S. at 497-498.)

[15] The principal purpose of the 1974 Amendments was to remove the special exemption for nonprofit hospitals contained in the Taft-Hartley Act. (S. Rep. No. 93-766, 93rd Cong. 2d Sess., at 3 (hereafter "S.Rep."); H.R. Rep. No. 93-1051, 93d Cong. 2d Sess., at 4 (hereafter "H.Rep.").) Thus, the Act "restore[d] to the employees of non-profit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees [because] the public interest demands that employees of health care institutions be accorded the same type of treatment under the law as other employees in our society . . .". (H. Rep., at 4; see also S. Rep., at 3, 4).

Thus, Congress acted in 1974 on the premise that employee self-organization and effective patient care are not inherently incompatible and on the belief that ultimately union activity in hospitals will aid in accomplishing the hospital's medical goals. Further, while Congress felt that the needs of patients in health care institutions require special consideration in the Act (S. Rep. No. 93-766, 93d Cong. 2d Sess., 3), as stated in *Beth Israel*:

> Congress addressed its concern for the unique problems presented by labor disputes in the health-care industry by adding specific strike notice and mediation provisions designed to avert interruption in the delivery of critical health care services; none expresses a policy in favor of curtailing self-organizational rights. Indeed, although Congress recognized that strikes could cause complete disruption of patient care and enacted provisions designed to forestall them, it apparently felt that extension of the right to strike was sufficiently important to fulfillment of its goals to permit strikes despite that result. [437 U.S. at 499.] [16]

[16] The balance struck in the 1974 Amendments was explicitly stated to be a "compromise." Legislative History of the Coverage of Non-Profit Hospitals under the NLRA, 112 (G.P.O., 1974) (Remarks of Sen. Taft), "a very carefully developed and finely tuned balance of competing considerations and philosophies that will, at the same time, protect labor and management rights and promote good health care." (Leg. Hist. 91 (remarks of Mr. Cranston)).

> [T]he National Labor Relations Board in administering the Act should understand specifically that [the] Committee understood the issues, confronting it, and went as far as it decided to go and no further, and the Labor Board should use extreme caution not to read into this Act by implication—or general logical reasoning—something that is not contained in the bill, its report and the explanation there . . . . [I]n this carefully tailored legislation Congress decided to treat the health care industry uniquely *in certain respects*. It decided to go so far, and no more. I trust this bill will be treated . . .

Indeed, Congress' determination to accord hospital employees a right to strike[17] demonstrates the unreality in terms of national labor policy of the Court of Appeals' position that the slight chance that a few patients will be aware of union activity in hospitals justifies severe restrictions upon employee rights. For, obviously, a patient or visitor who approaches a hospital surrounded by pickets will be well aware that there is union activity. And, a patient who is either treated by a skeleton staff or turned away or transferred because of a strike will not only be aware of a labor dispute but will be directly, rather than hypothetically, affected by it. A Congress willing to tolerate such occurrences plainly intended that the communication among employees long held essential to effective self-organization not be sacrificed to an immeasurably smaller risk of interference with patient care.

Further, given the hospitals' litigation posture since the passage of the 1974 Amendments, it is particularly striking that although many representatives of hospitals and of hospital associations appeared before Congress to express concern about continuity of patient care in the event of a strike, and the possible fragmentation of bargaining units, *none* so much as suggested that the mere knowledge of employee efforts to organize might adversely affect the health and well-being of patients. Nor were there any suggestions that the Act be further amended with regard to solicitation and distribution rules in hospitals. (See generally Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 93d Congress, 1st Sess. on S. 794, etc.) Against this background, the hospitals' plea to the courts in this and other cases that

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in the same spirit. [Leg. Hist. 361, (remarks of Sen. Williams, emphasis supplied).]

[17] Congress specifically *rejected* the views that strikes and picketing either could not be tolerated at all in hospitals (see e.g., S. Rep. at 39 (individual views of Sen. Dominick); Leg. Hist. 300, (remarks of Rep. Henderson)) or should be severely limited. (See Leg. Hist. 322-329; *compare* § 213 of the LMRA, 29 U.S.C. § 183.))

allowing such communications must be forbidden to assure proper medical care comes too late to be accepted.

B. Congress in 1974 not only indicated, by what it did as well as by what it did not do, that *some* risk of short-term disruption of patient care would be tolerated in the ultimate interest of stable labor relations, it also, as *Beth Israel* establishes, "was satisfied to rely on the [NLRB] to continue to exercise the responsibility to strike the appropriate balance between the interests of hospital employees, patients and employers." (437 U.S. at 497.)[18] For, while

> the Board is not expert in the delivery of health-care services—neither is it in pharmacology, chemical manufacturing, lumbering, shipping, or any of a host of varied and specialized business enterprises over which the Act confers its jurisdiction. But the Board is expert in federal national labor relations policy, and it is in the Board, not respondent, that the 1974 amendments vested responsibility for developing that policy in the health-care industry. [*Id.* at 501.]

The record in this case with regard to the supposed medical justification for the no solicitation/no distribution rule demonstrates well why the Board must be permitted to perform, in the hospital area as in others, "the balancing of the conflicting legitimate interests" (*Labor Board* v. *Truck Drivers' Union*, 353 U.S. at 87, 96), and why "[i]n each generic situation, the primary responsibility for making this accommodation must rest with the board in the first instance" (*Hudgens* v. *NLRB*, 424 U.S. 507, 522.) For, even if "there is [no] doubt as to the sincerity of the testimony of the two physicians who testified" (Opinion of ALJ, Pet. App. 70a), "[their] assessment of the need for

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[18] That Congress so determined is evident, of course, from the simple fact that, rather than creating a special enforcement procedure, or a more highly specialized agency to deal with labor relations in hospitals, the 1974 Amendments simply eliminated an exception and thereby committed hospital labor relations to the general policies and procedures of the NLRA.

[the no solicitation/no distribution rule] * * * overcompensate[s] [their] goals and give[s] too little weight to employee organizational interests." (*Beth Israel*, 437 U.S. at.)

The doctors' testimony here graphically exhibits this "overcompensation." While the doctors maintained that shielding patients from bad news, noise, hostility, and similar influences was necessary to good hospital practice, it is obvious both from the record in this case and from common experience with hospitals that the interferences with this ideal of tranquility are many, and that hospitals consciously chose to tolerate these interferences when there are compensating reasons for doing so.[19]

For example, as the doctors acknowledged, television sets and visitors often upset patients, either because of noise level or because of the topics shown or discussed. The hospital administration, however, has evidently determined that TV's and visitors are themselves important to many patients, and therefore has permitted them and has not undertaken to censor the shows which may be seen or the conversations between visitors and patients. Rather, the effort is to shield those particularly sensitive from the dis-

[19] [T]he imposition of relatively inflexible medical or organizational procedures on the hospitalized patient [, though] often justified in the interest of providing efficient care for the majority of patients, . . . as applied to the unique needs of the unique patient may include elements which are in direct conflict with the goals of both medical care and patient care. An illustration can be found in the experience of patients with respect to sleep or rest.

There are many conditions for which medical goals include maximizing opportunities for physical rest in order to facilitate recovery. . . . This medical goal is symbolized by the commonly seen street signs denoting a "Hospital Zone of Quiet."

Yet ironically many factors inherent in the social structure and organization of a modern hospital converge to make rest more difficult for all but the heavily sedated patient. Far from being restful, patients report great difficulty in acquiring uninterrupted sleep in most hospitals. The patient is often awakened

turbing influences, and, presumably, to limit these influences to reasonable hours and locations.[20]

Similarly, even if, as one of the doctors' testified, it is upsetting to patients and visitors simply to overhear conversations between employees which suggest that employees have concerns other than patient care, hospitals do not typically require absolute silence among employees except for discussions of patient care and medical practice.[21] Rather, so far as appears, hospitals permit their employees, like other employees elsewhere, to discuss their home lives, their friends, their monetary affairs, religion, politics, cur-

to meet the convenience of hospital routine. His personal biological timetable is upset. There is considerable noise engendered by the coming and goings of a large number of people, the movement of equipment, and the urgent voice of the hospital page. Most hospital patients must try to sleep in close proximity to other patients whose personal habits, periods of wakefulness and sleep, desire for entertainment, and requirements for medical attention may vary from their own. [Georgopoulos (ed.), *Organizational Research on Health Institutions* (1972), at 217.]

[20] See *Lutheran Hospital of Milwaukee* v. *NLRB*, 564 F.2d 208, 215 (C.A.7), vacated and remanded 438 U.S. 702.

[A] typical patient or visitor would be indifferent to solicitation or distribution conducted outside of immediate patient care areas . . . because the conduct of employees in locations such as cafeterias or lounges is irrelevant to the ordinary patient . . . We cannot believe that patients and their visitors who are present in these areas [cafeterias and lounges] are likely to become unsettled upon exposure to organizational activities conducted by employees. Labor unions are common entities in this country, and only an extraordinary patient would be so dismayed at witnessing an attempt to form one that his health would actually become impaired.

[21] See, *e.g.*, D. Gold, *Bellevue* (a documentary account of a week in a big city hospital) (1975), at 169:

At 9:30, [a nurse] joins several other nurses for a coffee break in the snack bar. It's the only place to have coffee, unless you brew it yourself, so the nurses tolerate the high noise level. They exchange tidbits of news and gossip and experiences. One

rent affairs, and all manner of other subjects—including such job-related matters as work schedules, relationships with supervisors, promotions, salary, and work rules among themselves in areas where patients may overhear.[22]

Thus, the fact that there are, in hospital work, situations and locations in which any conversation not related to the immediate patient care task at hand would be unacceptable —in the operating room, for example, or while examining or bathing a patient—has not led the hospitals to intrude upon ordinary human relationships among employees when they are *not* engaged in particularly sensitive tasks. The hospital does, of course, through its rules of conduct reserve the right to discipline employees who do not use good sense in where and how they talk among themselves. (See p. 13, *supra.*)

Yet, with respect to union organization, Baptist Hospital refuses to accept *any* risk of potential disturbance due to union organizational activity or to deal with the risk by rules directed not toward a total ban on such activity but toward minimizing the potential for patient and visitor in-

is planning a week at the Club Mediterranee in Martinique. Another, new to Bellevue, recalls her days with the Peace Corps in Colombia.

"It was on the Colombia-Venezuela border and I was the only nurse there," she says. "There were always military skirmishes going on. Our equipment included hundreds of vaginal speculums, don't ask me why, but antiseptic was hard to find. I would have settled for Listerine. We were treating troops hacked by machetes. After that, this place seems calm."

[22] See also, *id.*, at 374-375:

Chiarelli [a nurse] finishes rounds; the nurses scatter. The ward seems to be in the order in which Shiarelli wants to see it. She sits down, something she doesn't do often, and chats with the new nurse on the day shift.

"I've been a nurse in the jungle and I've been a nurse in the city and I'm not sure there's that much difference," the nurse says to Chiarelli . . . "The red tape, I just can't accept it. I can't believe that if you want a blood-pressure cuff, you can't get one. It takes years to get important equipment."

volvement.[23] Indeed, the two doctors who testified for the Hospital were willing to testify that union solicitation constituted an unacceptable risk to patient care, even though they had no knowledge of any situation in which such a risk became a reality, and even though they had absolutely no experience with union organizational activity, and no idea of how likely it was that union activity would create a disturbance.

This suggests only that in the calculus of values of the hospital and its medical advisors, levels of potential interference with patients entirely acceptable where countervailing interests favorable to the hospital are perceived, are not acceptable where the countervailing interest is employee self-organization. This calculus of values is clearly *inconsistent* with that reflected in the national labor policy as elucidated in the 1974 Amendments. For, as noted previously, Congress acted upon the premise that in the long run employee self-organization would be beneficial to patient care. Indeed, even though "The importance of the employer's interest in protecting patients . . . cannot be gainsaid" (*Beth Israel*, 437 U.S. at 505), Congress was willing

[23] In this regard, one incident stressed by the Hospital is particularly instructive: Counsel for the Hospital attempted to establish that "there were two employees [Mr. French] solicited to sign union cards that became hostile, very hostile." (A. 67). It turned out, however, that the "hostility" was simply that one employee said, in the cafeteria, that "if the union came in, she would walk out and quit . . . [P]eople [solicited] during the course of the campaign expressed their likes and dislikes [in the main cafeteria] even to the point of being openly in support of or openly in opposition to the union." (A. 67-68). It is likely, of course, that other employees discussed in the cafeteria an intention to resign from their jobs in the future and, as well, that on other subjects—political campaigns, for example—employees at meals "expressed their likes and dislikes . . . even to the point of being openly in support or openly in opposition." Thus, not only was the hospital acting upon a hypothetical risk of "hostility" which less restrictive means could prevent but, seemingly, it was defining as "hostility" in the union context personal interactions of a type which occur daily in ordinary human affairs, inside as well as outside hospitals.

to tolerate actual physical interference with patient care in the form of strikes to further that long-range goal. It is for this reason that the Labor Board must be permitted independently to perform the "difficult and delicate responsibility, . . . subject to limited judicial review" of "striking [the] balance to effectuate national labor policy" (*Truck Drivers Union, supra,* 353 U.S., at 96).

One further point is here relevant: In striking that balance, the NLRB can not be limited to the hospital employer's testimonial averments concerning the strength of its interest. Rather, there is, in any case of this kind, *objective* evidence available regarding the hospital's true medical judgment upon the degree of control over nonmedical events necessary to further its basic health mission. Specifically, the employer's actions in situations analogous to union solicitation but not involving union activity are the best indicia of its true medical judgment.[24]

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[24] It is worth noting that official hospital policy regarding solicitation and distribution and actual practice often diverge. As one hospital attorney noted soon after passage of the 1974 amendments:

> Two aspects of past practice are critical to our consideration. One is the almost universal policy of health care institutions to allow in and around their premises a wide variety of solicitors representing many causes and purposes. Another is the almost universal rule broad in scope and observed in the selective breach, which in words, not practice, typically prohibits all solicitation on hospital premises.
>
> This anomaly is one of the most important of the several practical problems that the new legal coverage imposes on hospitals. That is, the hospital understandably asks, 'How can we continue to support the activities we have in the past and not open the doors to all form of union solicitation?'. . . .
>
> Among the many solicitation/distribution activities permitted by hospitals are:
>
> 1. Sales promotion by representatives of pharmaceutical concerns.
>
> 2. Selling of raffle tickets and the like for institution-related fund-raising activities.

Where, as in this case and in *Beth Israel,* activities with potential for *emotional* disturbances of at least sensitive individuals are either not curbed at all or are regulated in a manner less restrictive than an outrgiht ban, the actual medical judgment of the hospital must be taken to be that the real danger of interference with medical care is not serious enough to require total exclusion. In contrast, oral opinion testimony by hospital administrators and medical advisors is much more likely to be tailored to litigation needs than is long-standing actual practice.

Thus, the NLRB's interest balancing role is important not only to give the proper weight to the employee self-organization interest and to provide the benefit of long experience in assessing the actual risk of disturbances from organizing activities. In performing that task, the NLRB also provides, despite its lack of medical expertise as such, an objective view of the strength of the management interest, based upon both the record in individual cases and upon its cumulative experience with practices in hospitals and other health care institutions.

III

The St. John's Hospital Rule as Here Applied

The Court in *Beth Israel* approved as both rational and consistent with the statute (*Labor Board* v. *Erie Resistor*

> 3. A variety of other fund-raising activities.
>
> 4. Sales and promotion of annuity contracts and other life, automobile, and casualty insurance programs.
>
> 5. Promotion of bazaars, benefits, cookie sales, and the like.
>
> 6. Reduced price sales of tickets.
>
> 7. Promotion of community events.
>
> 8. Employee's personal solicitation for fellow employees. . . .
>
> Equally significant is the distinctive attribute of the hospital's easy accessibility, both physically and attitudinally. The ease with which a stranger may enter any area of most hospitals without being stopped or questioned is astonishing. [Epstein, *Guide to NLRB Rules on Solicitation and Distribution,* 49 Hospitals (Journal of the American Hospital Association) 43, 44-45 (1975).]

Corp., 373 U.S. 221, 235-236), the approach developed by the Board in *St. John's Hospital*, *supra*, and applied in this case—*viz.*, the

> general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patient is consistent with the Act. [437 U.S. at 507.]

The concurring Justices, however, called for a "far more sensitive inquiry into the actual circumstances of each case." (*Id.* at 515.) And, the *per curiam* decision in *NLRB* v. *Baylor University Medical Center*, . . . U.S. . . ., 47 L.W. 3298 (Oct. 30, 1978), can be read as limiting the general *Beth Israel* approval of the Board's presumptive approach to cafeterias and like areas:

> The corridors of the hospital serving patients' rooms, operating and treatment rooms, and other areas used by patients and their families were neither involved nor considered by the Court in *Beth Israel*. [47 L.W. at 3298.]

Alternatively, *Baylor* may be read, and more appropriately, we believe, not as a limitation on the general approach apparently approved in *Beth Israel* but, instead, as a simple denial of certiorari upon a basically factual question. (See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491.) For, the Court characterized the decision below in *Baylor* as simply holding that "there was no *substantial evidence* supporting the Board's conclusion that the corridors were not . . . denoted essentially to patient care." (*Baylor*, 47 L.W., at 3298, emphasis supplied.)

We submit that this case demonstrates why the general *St. John's Hospital* approach is well within the Board's prerogative and, in fact, represents the most desirable means for fairly resolving hospital no solicitation/no distribution cases. (Subpart A, *infra*). Further, even upon the case-by-case approach suggested by the concurring Justices in *Beth Israel*, the Hospital in this instance has failed to demonstrate any substantial interference with its legitimate management interests which would justify the broad restrictions imposed. If, however, there is any doubt concerning whether in this instance "the Board was appropriately sensitive to the importance of [the Hospital's] interest in maintaining a tranquil environment for patients" (*Beth Israel*, 437 U.S. at 507), the case should be remanded for more precise factual development, to permit the Board to perform the balancing task anew in a more exacting fashion. (Subpart B, *infra*.)

A. We have already seen that Congress intended, in passing the 1974 Amendments, to give employee self-organization in the health industry the same protection it has long enjoyed in other industries (Part II (A), *supra*), and that, in hospital cases as in others, the basic task of fostering that employee right while taking the employers management interest into account has been entrusted to the NLRB.[25] In performing this task, the Board, of course, "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions," (*Beth Israel*, 437 U.S. at 501).[26] Thus, if there remains any dispute regarding the

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[25] Because, in this case, "the activity was carried on by employees already rightfully on the employer's property * * * the employer's management interests rather than his property interests were involved." (*Hudgens*, *supra*, 424 U.S. at 521-522, n. 10; see *Beth Israel*, 437 U.S. at 504-505; *id.* at 515 (Powell, J., concurring); see also *Eastex, Inc.* v. *NLRB*, 437 U.S. 556-573.)

[26] The concurring Justices in *Beth Israel* suggested that the presumption of invalidity in public access areas of hospitals is not entitled to deference because derived from the quite different industrial setting of *Republic Aviation*. We would agree that the transposing of a rule wholesale, where that rule rests in substantial part on an assessment of managerial interests, from an industrial to a health care setting would be unjustified. At the same time, the Board is surely entitled, from the continuing run of hospital cases and from common knowledge concerning hospitals, to draw general inferences covering different areas and situations in such institutions. That is, there does not seem to be anything special

St. John's Hospital approach, that dispute must center not upon whether the Board is entitled to proceed with a presumptive approach to hospital no solicitation/no distribution cases, but whether the actual choice of presumptions for various locations is a rational and appropriate means of striking the required balance.

Since "[t]he place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees . . . [and] banning of that solicitation might seriously dilute § 7 rights" (*NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325-326), the Board is certainly justified in demanding some significant justification before solicitation or distribution is restricted anywhere on the employer's property where employees otherwise have a right to be. Without any such justification, the rule would be "an unreasonable impediment to self-organization and therefore discriminatory." (*Peyton Packing Co.*, 49 NLRB 828, 8444, quoted in *Republic Aviation, supra*, 324 U.S., at 803-804 n. 10.)

In some generic situations the Board has recognized that management interests are usually strong enough to counterbalance employees' communication rights. For example, because "[w]orking time is for work . . . [i]t is within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours." (*Republic Aviation*, 324 U.S. at 803-804 n. 10.)

In *St. John's Hospital*, the Board recognized another generic justification applicable to "strictly patient care" areas of hospitals. The distinction drawn by the Board between "strictly patient care" areas and other areas where patients and visitors may be present, far from being

about hospitals which suggests such great variation from one institution to another as to preclude drawing general inferences about hospitals as a group. And, the exception for strictly patient care areas created in *St. John's Hospital* and applied here shows plainly that the Board has *not* simply carried over an inappropriate rule, but has separately balanced the interests of hospital employers and employees.

arbitrary is entirely reasonable. It is intuitively obvious that a high measure of quiet and employee concentration are required in immediate patient care areas. In contrast, it is just as plain that in other areas of a hospital the natural disorder of passageways [27] and the relaxed atmosphere of gathering places prevails. The norm in such areas is the bustle of movement, the sounds of conversation, radio and television and the sight of people reading or exchanging reading material. All this the Board was plainly entitled, if not, indeed, required, to take into account in determining whether the burden of demonstrating a need to restrict employee communication on union organization should be on the employer.

Thus, from familiarity with the types of activities which typically occur in various public access areas of hospitals, the Board can draw inferences regarding the true need for broad bans upon union organizational activity. (See Part II (B), *supra*.) Indeed, the record in this case illustrates why the real possibility of interference with patients care in areas not immediately devoted to patient care is remote.

[27] One study of hospital life reported the following incidents as typical:

> Three medical students, two interns, the assistant resident, the resident, and the visiting doctor, after making rounds in the ward move out into the hall and continue their discussion near the nurses' station. These eight men block the hallway from wall to wall. A student nurse who wants to go by with a bedpan stands waiting but without giving a sign until after almost a minute when one of the medical students moves without looking at her, and she passes.
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> • • •
>
> I am invited to join this same group in conference on the steps. The visiting doctor and I are offered chairs; the others sit on the steps. Visiting doctor: 'I'm utterly confused.' Everyone laughs. 'Now let's see how we will proceed. Do you have any hunches on this case? Let's have everybody's opinion. Let's go up the totem pole.' With a smile he points to a medical student. Everyone laughs." [R. Coser, *Life in the Ward* (1962), at 12.]

First, union organizers will typically choose locations in which large groups of off-duty employees are present for their activities; in this instance, those areas were the cafeteria and the parking lot. In such areas, by definition, the employees who are present will be engaged in interchange on all sorts of subjects, with the possibility, at least, of arguments and heated exchanges of opinion. If patients and visitors are permitted in such areas, as they typically are,[28] one must assume that the judgment has been made by the hospital that no significant medical harm will come to them from simply overhearing employees discussing their private concerns, and that general rules concerning unruly behavior by employees are sufficient to prevent real disturbances. And, as both this case and *Beth Israel* illustrate, the Board has been given no reason to conclude either that raucous outbreaks obvious to outsiders are more typical of union organizing activity than of the other activities occurring in the hospital's non-patient care areas, or that patients and visitors will in fact become aware of, much less upset by, normal union solicitation and distribution in areas where the patients and visitors present are not receiving immediate care.

Similarly, it is apparent that exposure to the everyday world is considered wholly compatable with sound patient care. For this reason, presumably, televisions are not only tolerated but supplied, despite the fact that some disturbance is caused. It is also for this reason, it appears, that doctors at Baptist Hospital, taking the risk that some untoward incident will upset the patient, permit pre-operative patients to go off the premises. Obviously, watching television or on a public street, a patient may encounter all sorts of emotionally upsetting incidents—at least as emotionally upsetting as realizing that, like most other people in American society, health care employees are concerned about their wages and working conditions and discuss

[28] Patients, of course, are allowed to leave their rooms and their floors only if their physical condition permits.

among themselves the pros and cons of uniting to improve their suitation. "The tensions of the market place" (*Beth Israel*, 437 U.S. at 509 (Blackmun, J., concurring)), of the international scene, etc., are *not* generally censored out of hospital life. Discussion of the right of hospital employees to organize should not be either.

As to the comparison of public access areas of hospitals to retail stores or public, commercial restaurants, the majority in *Beth Israel* has already demonstrated why the Board was entitled, if not required, to strike a different balance. (437 U.S. at 505-507.) We add that the fundamental character of the areas here at issue for the most part differ fundamentally from retail stores or commercial restaurants. They are areas in which there is much sitting about (lobbies), walking around (parking lots, corridors), and conversation not directly related to the main function of the employer. In contrast, on the selling floor of stores or in the eating area of restaurants, *any* activity not directly related to the service of customers is discouraged. Thus, the analogy to those situations in which the Board has recognized generic justifications is far from precise, and the distinction is well merited.

B. The concurring Justices in *Beth Israel* proposed, as an alternative to a presumption of invalidity in all non-patient care areas, a case-by-case balancing approach, in which the hospital would be required to show "a reasonable possibility of harmful consequences to patients or visitors," (437 U.S. at 515 (Powell, J., concurring)).[29]

[29] The concurring Justices also appeared to give considerable weight to the lack of alternative locations for solicitation and distribution; the majority in *Beth Israel* noted that this consideration "might" be appropriate in the hospital context. While, in this instance as in *Beth Israel*, the Hospital's present rule would have to be overturned even if this criterion were applied (see p. 18, *supra*), we respectfully suggest that this case also shows why such a rule is inappropriate. In *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, since non-employee activity was at issue, the employer's prop-

Upon this record, neither that showing nor the greater showing required by the *Beth Israel* majority—that the prohibitions are "necessary to avoid disruption of health care operations or disturbance of patients" (*id.*, at 4770)—has been made.

For example, while Baptist, unlike Beth Israel, did introduce testimony by doctors in support of its position, the Board was certainly entitled to reject that testimony as not demonstrating a "reasonable possibility" of harm to patients. For, the doctors, it turned out, were testifying not from personal experience with union solicitation but from imagined disruptions not indicated in the record, and preventable by less restrictive means. And, the Hospital tolerate sources of potential disruption presenting at least as great a likelihood of possible harm as union activity, a circumstances which indicates that the Hospital's October 1974 rule represents not the true medical judgment of the hospital but a balancing of risks inconsistent with national labor policy. (See generally Part I (B), *supra.*)) This indication is confirmed by direct evidence that the October, 1974 rule was adopted without medical consultation; was a response to union organizational activity begun after the passage of the 1974 Amendments; and was not impelled by any actual complaints from patients or visitors. Further, the hospital did not suggest that there was any concern about

erty rights, not managerial rights, were at stake. The issue of available alternatives, then, involved not different areas on the employer's premises, but any area on the premises versus all off-premises communication. Here, in contrast, the Board would have to decide, when faced with an overbroad rule excluding a number of different areas, precisely which excluded areas must be included to permit sufficient employee communication. Such a task, even if within the Board's competence, is so burdensome as not to be worth the candle. (Cf. Bok, *The Regulation of Campaign Tactics in Representation Elections*, 78 Harv. L. Rev. 38, 95 (1964).) For, if no independent showing of a real possibility of harm can be made for a restriction in a particular area, it is hard to see why an employer's interest in patient care is furthered by permitting restriction simply because other areas are available.

physical interference with patient care due to union organizational activity.[30] And, while the Hospital's Employee Handbook did note that employees should be careful about sensitive conversations in such areas as elevators and corridors, there was no attempt to forbid such conversations entirely.[31]

C. This last fact—similar to the circumstance stressed both by the *Beth Israel* majority and the concurring Justices—points toward another possible disposition of this case, if the Board Order is not affirmed outright. Even if a no solicitation/no distribution rule is otherwise valid, it is of course a cardinal principle of the NLRA, embodied directly in the language of § 8(a)(3), that union activity may not be treated *less* favorably than other analogous behavior. And, such discrimination necessarily impeaches any justification offered by the employer for the restriction imposed,[32] and at the same time conveys to employees a message of disapproval, thus defeating the "central purpose, of [§§ 8(a)(1 & 3)] to protect employee self-organiza-

[30] While there were some general references to union solicitation interfering with employees while at work (e.g., Tr. 428), there is, of course, no impediment under the Board's Order to that portion of Baptist's rule forbidding interference with on duty employees.

[31] The Court of Appeals acknowledged that "Both medical witnesses stated that person-to-person solicitation and distribution of literature in the parking lot should have no detrimental effect on patients within the hospital." (Pet. App. 10a.) Yet, although there was also testimony by the Hospital's vice president of personnel services that the Employer's rule, as revised in October, 1974, applied to the parking lot (Tr. 37), the court below "construe[d]" the rule so as not to cover that location. (Pet. App. 11a.) We are aware of no precedent for this procedure of "construing" an employer's rule contrary to its own interpretation so as to avoid entering an order enforceable by contempt. Thus, even on the Court of Appeals' analysis, the judgment below must be reversed to uphold the Board's order to the extent it applies to the parking lot.

[32] In this respect, the anti-discrimination principle governing labor union communication functions similarly to the First Amendment equal protection principle of cases such as *Police Department*

tion . . . from disruptive interference by employers." (*American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 317; see *id.*, at 316-318). We suspect, from the sort of facts stressed by Mr. Justice Powell in *Beth Israel* that the "far more sensitive inquiry into the actual circumstances of each case" (437 U.S. at 515) which he had in mind would focus largely upon evidence of the consistency of the Hospital's position. For, the *St. John's Hospital* approach, treating alike, as it does *all* no-patient care areas, does not focus upon the particular functions, uses, and expected behavior in specific areas of hospitals. Thus, to this extent, at least until it acquires greater experience enabling it to draw more discrete classifications of areas in hospitals, there is an argument for determinations based upon more particularized, well-developed records.

Toward this end, several labor organizations involved in hospital no solicitation/no distribution cases presently pending before the NLRB, including another affiliate of the Service Employees International Union, recently filed with the Board a Charging Parties' Statement of Position which suggested that such cases be remanded to ALJ's for further factual hearings, before further decision by the NLRB itself. In this Statement, the Unions presented a list of questions deemed pertinent to a sensitive consideration of no solicitation/no distribution cases, focussing upon particular areas of hospitals and upon restriction of activity in each area likely to be similar, in either physical or emotional impact, to labor union activity. We append hereto the list of questions for factual development recommended to the Board and respectfully suggest that, if the Court does not believe the Board, because of its presumptive approach, has met its burden of proof on the present record, it remand the case for the more particular factual development needed if case-by-case proof is required.[33]

v. *Moseley*, 408 U.S. 92, *City of Madison* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, and *First National Bank of Boston* v. *Belloitti*, 435 U.S. 765, 784-786. For, just as the distinctions based on message conveyed and person speaking in those cases illustrate that any purported neutral justification could not actually have impelled the speech restriction, so here discrimination among functionally similar activity demonstrates an impetus to quash the message because of its content rather than a legitimate, independent reason for restricting the speech. And, as the First Amendment cases illustrate, it is not sufficient for these purposes that activists both for and against a position are banned. Thus, the fact that the Employer in this case did not abide anti-union activity either is entirely beside the point; the justification for the rule is nonetheless impeached if *other* subjects with no less relation to the immediate tasks of the hospital are not banned.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Sixth Circuit should be reversed. Failing that, the judgment below should be vacated and the cause remanded with instructions to remand to the NLRB for further factual development.

Respectfully submitted,

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[33] We note that the questions outlined are, obviously, overlapping—that is, most are pertinent not only to the particular areas under which they appear but to other kinds of locations in the hospital as well.

APPENDIX

Excerpts from: Charging Parties' Statement of Position Suggesting a Remand for Further Factual Findings in *Beth Israel Hospital and Massachusetts Hospital Workers Union Local 880, Service Employees International Union, AFL-CIO, et al.*, NLRB Case Nos. 1-CA-11-469, etc.

Particular Questions to be Addressed on Remand

A. Non-Patient Access Areas

1. Does the hospital have any rules restricting the use of any or all of these areas during non-working time? If so, what are they and what is their purpose? Further, are such rules enforced uniformly?

2. Does the hospital have general rules governing what may be discussed in these areas—e.g., are any specific topics forbidden? In particular, are topics which might be termed "solicitation" forbidden—e.g., asking a fellow employee in the course of a conversation to contribute to a charity, to participate in a sports pool? Has the anti-solicitation rule ever been applied to cover such conversations?

B. "Strictly Patient Care Areas"

3. How the area in question is subdivided—for example, patient wards may include patient rooms, lounges or day rooms, and nurse's stations to which patients are not admitted.

4. As to each of the sub-areas delineated under question 3: Is a general attempt made to control noise level? If so, is this done by forbidding, or severely restricting, all conversation, or simply by forbidding noise and actual disturbance? Are the patients and visitors who are present in the area likely to overhear conversations between others which could be upsetting—e.g., political debates, disaster reports, etc., and what attempt is made, if any, to prevent such emotional disturbance? Are televisions and radios likely to

be on? Similarly, are employees forbidden to bring into the area all or some written material, or to pass such material among themselves? Does the hospital pass out employee newsletters or notices, and, if so, are they banned from the area in question? Do employees ordinarily converse in the area regarding aspects of their employment? Do employees discuss the medical condition of specific patients in the area? If so, what steps has the hospital taken to assure that patients are not upset by such conversation?

5. Also as to each of the specific areas delineated under (3) above: Has the solicitation/distribution rule taken on its terms been evenhandedly enforced? For example, are charitable solicitations permitted or encouraged? Does the hospital permit or encourage activity similar in physical intrusion to solicitation or distribution—for example, the circulation of books, magazines, pamphlets, etc., the use of television and radio?

C. Corridors, Elevators and Other Passageways

6. Are the corridors and elevators usual places for off-duty conversations, information exchanges among employees, etc? Are employees forbidden to congregate in the area, if not presently occupied or on immediate call? If so, is the rule enforced—that is, is a patient likely to encounter groups of employees conversing? Is there any evidence of such employee activity constituting a physical impediment to patient care?

7. Are patents and visitors likely to use the corridors for conversations, etc? Are patients and visitors advised that? If so, is there any evidence that activity by patients and visitors has ever impeded the medical care of other patients?

8. Are there differences *among* the corridors and elevators pertinent to the need to keep them clear of extraneous uses? For example, are some corridors and elevators reserved for non-ambulatory patient transportation, or for emergencies? Are some corridors and elevators more likely to be used predominantly by off-duty employees?

D. Public Areas—Lobbies, Gift Shops, Waiting Rooms, Outdoor Grounds, Eating Places

9. Is the area one typically used by employees during their off-duty time to pursue personal concerns, even though patients or visitors are sometimes present? Are there, e.g., employee bulletin boards, hospital posters for employees, or notices of employee events posted in the area?

10. Are newspapers, books, magazines and other media which may contain material which could upset certain individuals available in the area?

11. Is the area used for other solicitation or distribution, whether to patients and visitors or to employees? If material is distributed to employees, is an attempt made to assure that patients do not obtain it, and are the same type of controls applied to distribution of union materials?